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Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Marcia P. Dykes,

Petitioner,

v.

Northern Virginia Transportation District Commission, et al.

Respondents.

No. 91-1664

REPLY BRIEF

ADDRESSED TO ARGUMENTS FIRST

RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

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SCOPE OF REPLY TO NEW ARGUMENTS FIRST RAISED BY RESPONDENT IN ITS BRIEF IN OPPOSITION

The new arguments respondent Northern Virginia Transportation District Commission first raises in its brief in opposition go to the question of whether this Court has jurisdiction of the questions posed in petitioner's petition filed April 9, 1992, to review the procedural actions of the Virginia Supreme Court petitioner complains of for violations of the Due Process Clause pursuant to 28 USC 1257(a).

PARTIES

The appellants in the Supreme Court of Virginia were Marcia P. Dykes (the petitioner here) and Osgood Tower. Mr. Tower is not a party to the present petition having filed his own separate petition in an independent proceeding before this Court. The appellees in the Supreme Court of Virginia were the Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County, Virginia.

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PETITIONER'S REPLY TO RESPONDENT'S ARGUMENTS FIRST RAISED IN ITS BRIEF IN OPPOSITION

The petitioner, Marcia P. Dykes, pursuant to Rule 15:6 now files this reply brief to the brief in opposition to her petition for writ of certiorari (petition) filed by the respondent Northern Virginia Transportation District Commission on or about May 5, 1992. Petitioner's reply is directed to the following arguments first raised by respondent in its brief in opposition.

1. **Respondent's new and unsupported argument that a rehearing is necessarily a *de novo* proceeding is contrary to established Virginia law and procedure.**

As petitioner has previously cited in her petition, this Court has held, with regard to state appellate practices, that when a state opts to act in a field where its action has significant discretionary elements, it must act in accord with the dictates of the Constitution of the United States, in particular in accord with the Due Process Clause, which, like its forbearer the Magna Carta, is intended to secure the individual from the arbitrary exercise of the powers of government. *Evitts v. Lucy*, 469 US 387 (1985); *Daniels v. Williams*, 474 US 327 (1986); petition at 6.

This Court has just recently made the unambiguous ruling that it recognizes the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. *Coleman v. Thompson*, 111 S.Ct 2546, 2565 (1991). This Court has recognized that each State's complement of procedural rules is to channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently. *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984).

Because this Court has ruled, and correctly so we submit, that federal disruption or overturning of established state court procedures is damaging to the system of justice within those States, then the arbitrary disruption and overturning of established state court procedures and mandatory statutes governing such procedures *by the state court itself*, as was done by the Virginia Supreme Court by its wholesale departure from established rehearing procedure, and by its refusing to comply with the statutory mandate of Virginia Code 8.01-675.2, must be viewed with even greater censure by this Court. Not only does the action of the Virginia Supreme Court violate the basic concepts of decency and fairness which have been said to be among the fundamental principles of liberty and justice lying at the base of our civil and political institutions (Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L.Rev. 423, 442 [1961]), but it violates as well the concept of

fair and efficient disposition of questions this Court spoke of in *Reed, supra*.

At page 7 of the brief in opposition, in the paragraph numbered 1, respondent argues that when a court withdraws its opinion, sets aside its judgment, and grants a rehearing, "it follows that the rehearing will be *de novo*." No supporting authority for this broad claim is given, no doubt for the simple reason that Virginia authority not only does not support this claim, but contradicts it, thereby evidencing denial of due process for petitioner.

Virginia Supreme Court Justice Whiting (who wrote the original majority opinion of April 19, 1991) candidly stated in his dissent to the November 8, 1991 opinion – and was joined by Justice Stephenson, and Senior Justice Poff – that "a rehearing of this case has produced no arguments which were not made and considered [at the original hearing]." (Petition Appendix A, at 1a.) This statement by Virginia Supreme Court Justice Whiting, like the seminar statement of Virginia Supreme Court Justice Hassell and the accompanying printed handbook approved by the Virginia Supreme Court (Petition at 7–8) summarize the law concerning rehearings as that law existed until September 11, 1991.

As the following briefly quoted cases demonstrate, the decided case law in Virginia consistently states that a rehearing (1) focuses on an error on the face of the record, some legal excuse for failure to present a full defense, or the discovery of new and important evidence or testimony not known or accessible to the petitioner before the former hearing, and (2) places the burden of proof on the party seeking rehearing.

> In order to demonstrate an entitlement to a rehearing, a petitioner must show either an "error on the face of the record, or ... some legal excuse for his failure to present his full defense at or before the time of entry of the decree. *Holmes v.*

Holmes, 7 Va. App 472, 480, 375 S.E.2d 387, 392 (1988)

> The petitioner's right to relief on such rehearing *depends upon his ability to point out* some error on the face of the record, or to show some legal excuse for his failure to present his full defense at or before the time of entry of the decree which he seeks to have modified. (Emphasis added) *Downing v. Huston, etc. Co.*, 149 Va. 1, 9, 141 S.E. 134, 137 (1927). Cited in *Holmes, supra*.

> As the petition to rehear did not allege the discovery of new and important testimony not known or accessible to the petitioner before the former hearing and pointed out no error upon the face of the former decree, it was properly dismissed. *Woods v. Early*, 95 Va. 311, 28 S.E. 375. Cited in *Downing, supra*.

> Courts are provided for the purpose of putting an end, and a speedy end, to controversies, not as a forum for endless litigation. Without valid excuse, no party who has had his day in court can reopen the hearing after final decision of extrinsic matters in controversy between the same parties on the mere ground that he wishes to interpose other defenses which he neglected to interpose before such decision was made. *Gills v. Gills*, 126 Va. 526, 101 S.E. 900. Cited in *Downing, supra*.

Under Virginia law, the appellate power of the Virginia Supreme Court is purely statutory. *Bedinger v. Com.*, 7 Va. (3 Call) 461; *Clark v. Conn*, 15 Va. (1 Munf.) 160. Virginia Code 8.01-675.2 makes no provision that a rehearing be *de novo*, nor can this power be implied since the Virginia statute governing

appeals within the state system, from the Virginia general district courts to the Virginia circuit courts, Virginia Code 16.1-136, specifically provides that the appeal taken "shall be heard *de novo* in the appellate court."

Applying the familiar maxims of *inclusio unius es exclusio alterius* and *noscitur a sociis* to construction of the legislative scheme governing all Virginia courts requires the conclusion that rehearings at any level of the Virginia court system are not to be trials *de novo* since the legislature has used this term in certain instances, but has declined to do so with regard to rehearings.

It is well settled law in Virginia that the legislature acts with full knowledge of the law as it stood bearing on the subject with which it proposed to deal. *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600-601, 331 S.E. 2d 476, 479 (1985). The basic decisions cited above regarding the focus and burden of the rehearing procedure in Virginia predate the enactment of Virginia Code 8.01-675.2, and by equally well settled Virginia law, the Virginia legislature is presumed to be cognizant of the decisions of the Virginia Supreme Court and acquiesces in such decisions unless the legislation subsequently passed concerning the subject matter explicitly countermands a decision of that Court. *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600-601, 331 S.E. 2d 476, 479 (1985); *Burns v. Stafford County*, 227 Va. 354, 360, 315 S.E. 2d 856, 860 (1984); *McFadden v. Commonwealth*, 3 Va. App. 226, 230, 348 S.E. 2d 847, 849 (1986); *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E. 2d 445, 449 (1952). The omission of the term *de novo* in Virginia Code 8.01-675.2 governing rehearings by the Virginia Supreme Court, taken in the context of the use of the term *de novo* in statutes governing other judicial appeals compels the conclusion that the legislature intended no departure from the purpose and burdens of the rehearing procedure as stated in the decided cases.

2. Respondent's new argument that petitioner misunderstood the rehearing process is contradicted by the facts.

Respondent, at page 7, paragraph 1, of its brief in opposition suggests that petitioner "initially misunderstood the process, because the question before the Virginia court was solely a question of law . . ." This statement is at once demonstrably false and confusing.

Petitioner is not certain what respondent means by stating that the question at the rehearing was "solely a matter of law." The only attempt respondent makes to define the question of law giving rise to the rehearing is found at page 4 of the brief in opposition where respondent refers to "the far reaching implications of the majority opinion [of April 19, 1991]." This is hardly sufficient because anytime the highest appellate court of a State issues an opinion, the implications are "far reaching."

As to the genuine questions of law involved in the case, all these were resolved by the April 19, 1991 opinion, thus leaving for consideration upon rehearing only new questions of law which had not been available to be raised in the original hearing. But as petitioner, and, more significantly, Virginia Supreme Court Justices Whiting, Stephenson, and Senior Justice Poff have observed, no new question of law relating to the substance of the case was raised by respondent, much less briefed or argued at any point in the rehearing.

It is disingenuous to argue, as respondent attempts to do by innuendo, that petitioner in any way misunderstood the rehearing procedures as they existed up until September 11, 1991. Petitioner thoroughly understood these procedures, just as did the Supreme Court of Virginia when on September 11, 1991, just five days before oral argument, it notified petitioner that the rehearing procedure was suddenly being changed. (Appendix A hereto)

The fact that this letter was sent is conclusive evidence of the fact that the Virginia Supreme Court was acutely aware that it was changing its rules of procedure at the last minute and was abruptly departing from long established and well understood procedures; procedures which the present justices themselves had reiterated as recently as some three months before at the referenced meeting in Richmond, Virginia on June 18, 1991. (It should be noted here that although respondent, at pages 7–8 of its brief in opposition, seems to suggest that this Richmond meeting did not have the official imprimatur of the entire court, and that only a single justice made the remarks concerning rehearings, this is not true, for *all* justices of the Virginia Supreme Court participated in this meeting and the handbook quoted from was issued with their approval and was not contradicted at any time during the many discussions involving all the Virginia justices.)

This change in procedure meant far more than changing the order of argument as respondent would have this Court believe. This last minute abrogation of procedure by the Virginia court, changed the issues to be argued at the rehearing and switched the burden of proof. Under rehearing procedures as they existed up until September 11, 1991, respondent had the burden of proof of arguing some new development of law since the hearing which led to the April 19, 1991 decision. Instead, at almost literally the last minute, when petitioner no longer had an opportunity to rebrief the case, and with little opportunity to adjust argument to the abruptly and mysteriously changed rules, petitioner was suddenly charged with rearguing the entire case from "square one", and before a suspiciously convenient reorganized *banc* of justices.

3. Respondent's new argument that the issue before this Court concerns the lower court's composition in "any particular case" is bogus and an attempt to divert this Court's attention from the due process issue presented.

At page 8, paragraph 3, of its brief in opposition, respondent states that "[t]he method used by a state court to determine whether regular sitting justices will sit in any particular case does not create a federal question." Were this the issue actually posed, petitioner would have to agree. But that is not the issue. Because of the rarity, it is proper to label a rehearing an extraordinary proceeding. The issue posed here is not directed to regular appellate hearings, but is whether *after a case has been decided* federal due process requires that on a rehearing of the case only those justices or judges who participated in the original should take part (with, of course, the burden on the party seeking rehearing to meet the long established burdens of proof).

4. Respondent, without support of any authority, is asking this Court to divest itself of jurisdiction for review of state court adherence to the federal Due Process Clause required by 28 USC 1257 (a) and Amendment XIV to the Constitution of the United States.

At page 8, paragraph 4, of its brief in opposition, respondent argues that if the state court believes its action complies with statutory procedural requirements, then the state court determination is binding on this Court. (At page 5 of the brief in opposition, in lines three and four of the first partial paragraph, respondent appears to suggest that action by the clerk of the state court is sufficient to divest this Court of jurisdiction over questions of compliance with federal due process requirements.) Put another way, respondent is arguing no less than that this court should abandon a long line of previous decisions, including those cited in petitioner's petition for writ of certiorari, and surrender to state courts the jurisdiction and authority to determine whether the state's (and that court's) judicial procedures meet federal due process requirements under Amendment XIV. What respondent urges would nullify 28 USC 1257(a) and be an abdication of the established and statutory jurisdiction of this Court. The magnitude of the interpretation of law respondent

urges this Court to adopt is surpassed only by the absurdity of the request itself.

5. Respondent's argument that petitioner had the opportunity to brief her case prior to oral argument at the rehearing is untrue.

At page 8, last full paragraph, of the brief in opposition, respondent argues that petitioner "was given the opportunity to brief the case prior to the second argument." This is either a misprint or respondent is deliberately attempting to falsify facts and mislead this Court.

The rehearing was granted *ex parte* on June 4, 1991. Petitioner had 30 days from that time to file her brief in reply, but requested additional time, which was granted, with the petitioner's brief in reply being filed on July 13, 1991. The change in procedures denying petitioner due process, however, was not announced until September 11, 1991, some two months after the filing of her brief in reply, and a scant five days prior to oral argument. Even had the petitioner's counsel filed a revised brief in this short space of time prior to oral argument, such filing would have been futile because the Rule 5:39 of the Virginia Supreme Court governing rehearing only provides for filing of the brief in reply filed in July.

Petitioner agrees with this Court's ruling in *Matthews v. Eldridge*, 242 U.S. 319, 33 (1976), cited by respondent at page 8 of the brief in opposition, that fundamental due process requires the right to be heard at a meaningful time and in a meaningful manner. It is precisely these due process requirements which were violated by the Virginia court in a blatant and cynical manner which rendered the September 16, 1991 rehearing a procedure more akin to the "show trials" of totalitarian countries,

than to a proceeding under the laws and constitutions of Virginia and the United States of America.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this 13th day of May, 1992, forty copies of this Reply Brief of the Petitioner, Marcia P. Dykes, were filed in the Clerk's Office, and three copies mailed to William G. Broaddus, One James Center, Richmond, Virginia 23219, 804/-775-1000; A. Francis Robinson, One World Trade Ctr., New York, NY 10048, 212/839-5323, counsel for respondent, Northern Virginia Transportation District Commission; and Robert L. Howell, Acting County Attorney, 12000 Government Center Parkway, Suite 549, Fairfax, VA 22035, 703/324-2421, counsel for Board of Supervisors of Fairfax County, Virginia.

Fredrick H. Goldbecker

APPENDIX

APPENDIX A

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September 11, 1991

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v. Northern Virginia Transportation District Commission, et al.
Record No. 901033

Re: Osgood Tower
v. Northern Virginia Transportation District Commission, et al.
Record No. 901037

Counsel:

The Court has instructed me to inform you that, because the opinion was withdrawn in these cases, counsel will be permitted to argue all assignments of error contained in the opening briefs, and are not limited to the issues addressed in the Court's opinion. Accordingly, the appellants will argue first and the time allotted to argument has been increased to 60 minutes to be divided evenly between appellants and appellees.

Feel free to contact me if you have any questions.

Sincerely,

Patricia H. Krueger
Chief Deputy Clerk

PHK:slh

cc: Scott A. Mills, Esq.
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